Supreme Court of Ohio.

ARROWSMITH v. HORMENING.

In the absence of proof an act of the legislature is presumed to take effect from the first moment of the day on which it is passed.

The rule that the law never regards the fraction of a day will not be applied where its application would defeat a vested right, or otherwise work injustice; but where an act has an exception in favor of pending actions, it is incumbent on a party who wishes to bring an action, commenced on the same day, within the exception, to show, by proof, the exact time of day at which the act was passed.

MOTION to dismiss petition in error. The following were the facts:

On April 18th 1883, an act was passed (80 Ohio L. 169), amending sect. 6710, Revised Statutes, which allowed petitions in error to be filed in the Supreme Court without leave, so as to require leave to be first granted. It repealed the original section, and enacted that the amended section "shall take effect, and be in force, *from and after its passage*, and apply to all cases and proceedings *hereafter* brought in or into the Supreme Court."

On the same day, but whether before or after the act was passed does not appear, a petition in error was filed in this case without leave of this court.

Newbegin & Kingsbury, Latty & Peaslee, for the motion.

Harris & Cameron, Cox & Cochran, contra.

The opinion of the court was delivered by

JOHNSON, C. J. —This motion is not well taken if the petition in error was a pending action or proceeding when the act of April 18th 1883 took effect; because sect. 79 of the Revised Statutes provides that the amendment or repeal of a statute "shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the *remedy*, it shall not affect pending actions, prosecutions or proceedings, unless so expressed."

The provisions of sect. 6710, as amended, relate to the remedy in a civil action. They do not affect pending actions or proceedings, but in express terms the act applies "to all cases and pro-

ceedings hereafter brought in or into the Supreme Court." In behalf of the motion to dismiss two grounds are relied on.

1. That the act of April 18th, which took away the right to file a petition in error without leave, took effect *from and after the first moment of the day of its passage*, though, in fact, not signed by the presiding officers until some time towards the close of the day, and therefore it was in force during all of that day, and no petition in error could on that day be filed without leave.

2. If this is not so, then the journals of the two houses of the legislature show the act was, in fact and in law, passed on the 17th, though not enrolled and signed until the next day, and, therefore, an action commenced on the 18th was after the act passed and took effect.

Assuming, without deciding, that the repealing statute did not take effect until the 18th, the point to be determined remains, was the petition in error filed *after* it took effect, or before? If before it took effect, then, by sect. 79 of the Revised Statutes, it was a pending case under original section 6710, and the repeal did not affect it; but if after, then leave must be obtained, and the motion is well taken.

This act was passed and took effect from and after its passage. On the same day the petition in error was filed. Which was first in point of time on that day we are not advised by proof. As there is no law requiring that the exact time in the day shall be noted of the passage of an act, or the commencement of an action, there is no record evidence of the fact, but resort may be had to other proper proof.

If we are advised of this fact, it would doubtless be proper to disregard the maxim that the law knows no fractions of a day, and to determine, as a fact, the exact time during the 18th day of April the petition was filed and the act passed, and if the former was the first in time, to hold that the repealing statute, in view of the provisions of sect. 79, did not affect it, though it relates to the remedy, merely. This would seem to follow from the terms of article 11, sect. 28, of the constitution, which provides that the general assembly shall have no power to pass retroactive laws; and from the provisions of sect. 79 of the Revised Statutes, which provides that a repeal or amendment of an existing statute, even as to the *remedy*, shall not affect a pending action, unless it is expressly so provided in the repealing statute.

These provisions would seem to apply as well to parts of a day as to whole days. A law passed in the latter part of a day, if it affected transactions of the earlier part of the day, would be retroactive in its operation as fully as if they took place the day before. So I think if this petition in error was filed on the same day, but before the repealing statute was passed and took effect, it would be a pending case within the meaning of sect. 79. The rule that the law never regards the fractions of a day is only observed for the purposes of justice; but when its application would defeat a vested right, or otherwise work injuriously, it will not be applied.

Thus, in *Seaman* v. *Eager*, 16 Ohio St. 209, it was held that the exact moment in a day might be resorted to, to determine the rights of parties under the acts relating to the filing and refiling of a chattel mortgage, and that time is to be counted from the moment of such filing, and not from the day. The same rule was applied in *Follett* v. *Hall*, 16 Ohio 111, where a mortgage was filed on the first day of a term of court, but before the court convened. So where an attachment was sued out at *seven o'clock* P. M., of March 8th, and a petition in bankruptcy was filed at *two o'clock and fifty minutes* in the afternoon of the 8th of July, it was held, that as the bankrupt act dissolved all attachments sued out within four months before the commencement of proceedings in bankruptcy, and as the actual time was less than four months, by four hours and ten minutes, the attachment must fail: *Westbrook Manufacturing Co.* v. *Grant*, 60 Me. 88.

The same rule has been applied when it becomes important to ascertain the order in which two or more statutes, bearing the same date, are passed: Bishop on Written Laws, sect. 29. To the same effect are *National Bank* v. *Burkhart*, 100 U. S. 686; and *Lang* v. *Phillips*, 27 Ala. 311. So where there are two statutes containing repugnant provisions, the one last signed by the governor is a repeal of the one previously signed: *Southwark Bank* v. *The Commonwealth*, 26 Penn. St. 446.

And in *The People ex rel.* v. *Clark*, 1 Cal. 406, it was held that a statute which was to take effect from and after its passage, takes effect from the moment it is approved by the governor, and for the purpose of determining the right of a person to an office, it is competent to inquire at what particular point of time in the day it took effect.

See also *Gardner* v. *The Collector*, 8 Wall. 499, where it is said

to be settled on principle, as well as authority, that whenever a question arises in a court of law as to the time when a statute takes effect, appropriate proof may be resorted to, to determine when the act took effect, that is, the exact time in the day.

No such proof was offered in the case at bar. If the plaintiff in error relies on the fact that his action was pending on the 18th, before the actual time of the passage of the statute in question, he must, in order to defeat the presumption that it went into effect the first moment of that day, show that his petition was first filed. This he has not done, and we are left to the presumption that arises from the date of the act,

As section 6710 relates to the remedy merely, we are not embarrassed by any question of vested rights, or by the provision of the constitution, art. 11, sect. 28, relating to retroactive laws. His right, if he has one, arose under original section 6710, and is saved by section 79, which saves pending actions in case of a repeal of a statute relating to the remedy. This statute took effect "from and after its passage," and not from and after *a day named* in the act. The day it was enacted is to be included.

When the computation is to be made from an act done, the day on which it was done is included.

In this respect it differs from a statute repealing a former statute on the same subject, which is to take effect from and after a day named therein. In that case it does not take effect until the expiration of the day named: *Koltenbrock* v. *Cracraft*, 36 Ohio St. 584.

By its terms the act took effect on the 18th and not on the 19th of April, and the presumption arises in the absence of any proof of the exact time of the day on which it was passed, that it took effect from the first moment of that day. Formerly, in England, the rolls of Parliament were strung together as one act, the only date being that of the assembling of Parliament. In that case the presumption was that the act took effect from the first day of the session, the record being the sole guide: *Latters* v. *Patten*, 4 D. & E. 660.

The act of 33 Geo. 3, c. 13, provides that after 1793 the day of the royal assent to an act was required to be endorsed on the act, and the date of that indorsement fixed the day the act should take effect, and by construction the act took effect from the first moment of that day: *Tomlinson* v. *Bullock*, 4 Q. B. D. 230. The rule thus stated governs, except when some provision of law is violated,

or where adherence to it would work injustice. When this would result, the fiction that the law knows no fraction of a day would yield to proof of the exact time in the day an act was passed.

But as no case is made by the plaintiff in error to enforce this principle, we are left to the ordinary presumption that the act of April 18th took effect from the commencement of that day, and therefore there was no "pending case" when it took effect: Bishop on Written Law, chap. 4, and notes; *Arnold* v. *The United States*, 9 Cranch 104; *In re Wyman*, Chase's Decisions 227; *National Bank* v. *Burkhart*, 100 U. S. 686; *In Matter of Joseph Richardson*, 2 Story 571.

Motion sustained.

The principal case contains a very clear statement of the reason why the early English statute took effect from the first day of the session of Parliament. In an old authority it is said that "every statute begins to have effect, unless a time is therein mentioned, from the first day of that session of Parliament in which it is made:" Bacon's Abr. 636, Let. C.; 4 Inst. 25; Brook's Abr., pl. 8, 6; Plowd. Com. 796; *Panter* v. *Attorney-General*, 6 Bro. Par. Cas. 486; *Henley* v. *Jones*, 1 Sidf. 310; *Rex* v. *Call*, Comb. 413; s. c. 1 Ld. Raym. 370; Hob. 111; Cro. Car. 424. Even where the act declared that it should take effect "from and after the passing of the act," it was held to operate by legal fiction from the first day of the session: *Latless* v. *Holmes*, 4 T. R. 660. See opinion of the judges, 3 Gray 601. In 1797 the Supreme Court of New Jersey declared this rule was in force in that state, even in criminal cases; and the court referred to a case that had been before it, where the offence was highly penal, and considerable anxiety had been felt whether the court was authorized to adopt another rule; a verdict of acquittal obviated the necessity of a decision: *Austin* v. *Nelson*, 1 Halst. 381. The English rule was followed in North Carolina, until 1799, when it was changed by statute: *Smith* v. *Smith*, Mart. 26; *Weeks* v. *Weeks*, 5 Ire. Eq. 111; *Hamlet* v. *Taylor*, 5 Jones L. 36; *Sumner* v. *Barksdale*, Const. Rep. 111; *State* v. *The Banks*, 12 Rich. L. 609.

Sometimes this rule operated very harshly. In *Rex* v. *Thurston*, 1 Lev. 91, by this relation an act was rendered a murder, which was not so when the deed was committed.

As stated in the principal case, the rule has been changed by statute. And although it be expressly declared in the statute that it shall take effect from a day named therein, yet, if the royal assent be not given until after the day mentioned, it will not take effect until signed by his majesty, and will have no retroactive effect: *Burn* v. *Carvolho*, 4 N. & M. 893. But where an act was passed to correct an error in a statute previously passed at the same session, it was held to relate back to the time when the first act had been passed: *Attorney-General* v. *Pougett*, 2 Price 381. See 1 Kent's Com. 495.

In an early case the Supreme Court of the United States decided that a statute passed March 3d 1803, was in force on that day; and declared the general rule to be that a statute is operative from its date, if its operation is not postponed by some law: *Mathews* v. *Zane*, 7 Wheat. 164; *The Brig Ann*, 1 Gall.

62; *Johnson* v. *Merchandise*, 2 Paine 601; *Goodsell* v. *Boynton*, 1 Scam. (Ill.) 555; *Branch Bank of Mobile* v. *Murphy*, 8 Ala. 119; *Heard* v. *Heard*, 8 Geo. 380; *Temple* v. *Hays*, 1 Morr. (Ia.) 9; *Dyer* v. *State*, 1 Meigs (Tenn.) 237; *Smets* v. *Weathersbee*, R. M. Charlton (Geo.) 537; *Rathbone* v. *Bradford*, 1 Ala. 312; *State* v. *Click*, 2 Id. 26; *Parkinson* v. *State*, 14 Md. 184; *Taylor* v. *State*, 31 Ala. 383; *State* v. *Banks*, 12 Rich. (S. C.) L. 609; *Chapman* v. *State*, 2 Head (Tenn.) 36. It is presumed that the statute is in force from the earliest moment of the day of its passage, if it goes in effect on that day: *Salmon* v. *Burgess*, 1 Hughes C. C. 356; *West* v. *Creditors*, 1 La. Ann. 365; *Mallory* v. *Hiles*, 4 Met. (Ky.) 53: *Bassett* v. *United States*, 2 Ct. of Claims 448; *Tarlton* v. *Peggs*, 18 Ind. 24. See *Fairchild* v. *Gwynne*, 14 Abb. Pr. 121; *Rice* v. *Ruddiman*, 10 Mich. 125; *Price* v. *Hopkin*, 13 Id. 318; *Re Carrier*, 13 Bankpt. Reg. 208; *The Schooner Lynchburg*, Blatch. Prize Cas. 3; *In re Ankrim*, 3 McLean 285.

The only case that holds a different rule is *King* v. *Moore*, Jefferson's Rep. (Va.) 9, where the words of an act were "from and after the passing of this act;" the day of passing the act was held to be excluded. See, however, *State ex rel. Fosdick* v. *Perrysburg*, 14 Ohio St. 472; also *Matter of Richardson*, 2 Story 571; *Laughlin* v. *Commonwealth*, 13 Bush (Ky.) 261; *Gamble* v. *Beattie*, 4 How. Pr. 40.

In Tennessee it is said a statute is "passed" when signed by the governor, or carried over his veto: *Logan* v. *State*, 3 Heisk. (Tenn.) 442; and, although, by its terms, it is to take effect from its passage, it does not go into force until it is signed by the governor: *Hill* v. *State*, 5 Lea (Tenn.) 725; see *Clarke* v. *City of Rochester*, 24 Barb. 446; *Wartman* v. *Philadelphia*, 33 Pa. St. 202; *United States ex rel. Jones* v. *Fanning*, Mor. (Ia.) 348. Where two statutes went into effect the same day, it was said that there was no doubt that they took effect the same instant: *Griswold* v. *Atlantic Dock Co.*, 21 Barb. 225.

An act laying duties on goods imported, "from and after the passage of the act," takes effect the beginning of the day on which it is passed, and not from the time of its being signed by the president. And it was said by the court: "From the impracticability of deciding at what particular moment of time the president gives his seal to a bill, we have never heard of such inquiry being made, and the least which courts have ever said on such occasions is, that where an act is to take place from the day of its passage, as is the case here, it must embrace the whole of that day. Here, emphatically, no fractions of a day should be allowed; otherwise the commencement of a law, would in such cases, not be a matter of record and uniform, but depend on evidence as to the time of signature, and would vary in different courts according to the testimony which might be offered as to that fact:" *United States* v. *Williams*, 1 Paine C. C. 261. This case did not admit parol evidence to prove the exact time of the approval by the executive. Other cases follow this ruling: *In re Welman*, 20 Vt. 653; *In re Howes*, 21 Id. 619. But it will hereafter appear that the case in Paine's Reports has been overruled by the Supreme Court.

All treaties take effect from the time they are signed by the plenipotentiaries who sign them, unless they otherwise provide; and this ratification relates back to such time: *Davis* v. *Concordia*, 9 How. 280; *United States* v. *Reyner*, Id. 127; Vattel, B. 4, c. 2, sect. 22. A resolution passed by Congress takes effect from the beginning of the day of its approval: *Smith* v. *Draper*, 5 Blatchf. 238.

FRACTIONS OF A DAY.—While the general rule undoubtedly is that statutes

will be deemed to have taken effect at the first moment of the day they go into force, yet there are cases where such a rule will not be enforced. If the statute is to take effect a certain number of days after its passage—say twenty days—the general rule will undoubtedly prevail. But where it takes effect "from and after" or "on" the day of its passage, the exact time or moment its passage is finished may undoubtedly be shown.

In Alabama the rule was stated as follows: "Upon authority and principles of policy and convenience * * * we decide that a public statute, remedial in its character, and not prescribing punishment or penalties, is of force during the entire day of its approval, and that the law in reference thereto does not recognise any fraction of a day. Yet we concede that the decisions are not entirely harmonious:" *Wood* v. *Fort*, 42 Ala. 641; citing *Eliza* v. *State*, 39 Id. 693; *Mobile and Ohio Railroad Co.* v. *State*, Id. 573; *Joseph Richardson*, 6 Law Rep. 392; *David* v. *Howes*, Id. 297; *In re Welman*, 20 Vt. 653; *Arnold* v. *United States*, 9 Cranch 104.

But this general rule was not followed in Massachusetts in a case before the Supreme Court of that state. There an action had been commenced before a justice of the peace on the day of the passage of a statute which vested the exclusive jurisdiction of all such actions, *not already pending*, in a police court, and took effect "from and after its passage." It was held that the action could not be dismissed for want of jurisdiction, without proof that it was commenced at a later hour than the approval of the act by the governor. The court said: "It being conceded that the justice had jurisdiction until the precise point when the act was approved by the governor, the justice had jurisdiction during a portion at least of the 7th of May. His jurisdiction previously acquired was in full force in the early part of that day, and, for aught that appears, for many hours of that day. To sustain this motion to dismiss, it must be made apparent that this writ was issued after the passage of this act. Showing merely that it was issued on the 7th of May fails to establish that fact, and there is nothing else in the case to show it:" *Kennedy* v. *Palmer*, 6 Gray 316.

The principal case declares the rule to be—as a rule of *construction* not as a rule of presumption—that in the absence of evidence it will be held that an act of the legislature took effect from the earliest moment of the day of its passage. In such an instance the court will not take judicial notice of the exact time of the approval of the act, because of the impracticability of its ascertainment. To overcome the rule of construction, evidence must be introduced to enlighten the court.

In 1861 President Lincoln approved an act of Congress without designating the year of approval. Parol evidence was admitted to prove the year in which it had been approved. The reasoning of the court led to the following points:

1. It being the duty of the judge to take judicial notice of the contents of a public statute, which need not be proven before them as facts, they must take also judicial notice of the date of their enactment.

2. In ascertaining, therefore, the date, the judge should look at whatever appears to be adapted to inform their own minds. The date attached to the president's signature, if full, will ordinarily be sufficient.

If it is not full resort may be had to the journal, the time of publication of the statute, and other sources, to fill the blank. If the ends of justice require the precise moment to be ascertained, this may be done if in any way the minds of the judges can be reasonably satisfied. It may even be shown that the date

which the president attached to his signature is an error. "We are of opinion, on principle as well as authority, that, whenever a question arises in a court of law, as to the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule:" *Gardner* v. *The Collector*, 6 Wall. 499.

In Illinois parol evidence was admitted to show that an actual signing of the bill, as approved, was done by mistake: *People* v. *Hatch*, 19 Ill. 283. See *Speer* v. *Plank Road Co.*, 10 Harris 378.

The case in Wallace's Reports was followed in *Matter of Wynne*, Char. Dec., p. 251.

Where duties on goods had been paid, and they were so stamped and removed, and on the same day the president approved a bill increasing the duties on such goods, it was held that such increase of duties could not be enforced on such goods. In this case it was agreed that the duties had been paid and the goods removed from the storehouse, before the approval of the act. It was said: "In the present case the president approved the bill, and the time of such approval points out the earliest possible moment at which it could become a law; or, in the words of the Act of March 3d 1875, at which it took effect:" *Burgess* v. *Salmon*, 97 U. S. 381; distinguishing *Lapeyre* v. *United States*, 17 Wall. 191; where the inquiry was, whether a proclamation issued by President Johnson, bearing date June 24th 1865, but published and promulgated June 27th of the same year, took effect on the first date on the latter—it was held that it took effect June 24th 1865.

In the case of the *United States* v. *Norton*, 97 U. S. 164, the court decided that the President's Proclamation of June 13th 1865, took effect as of the beginning of that day, and covered all the transactions of that day to which it was applicable. But it was added: "We do not think this is a case in which fractions of a day should be taken into account." This construction was adopted to *avoid* the enforcement of a *forfeiture*. The construction adopted in *Gardener* v. *The Collector*, *supra*, was also adopted to avoid a forfeiture.

Mr. Justice STORY had occasion to discuss the question under consideration with considerable fulness. By an act approved March 3d 1843, the statute establishing a uniform system of bankruptcy throughout the United States, approved August 19th 1841, was repealed. But it contained a *proviso* that the act should not affect any cause or proceeding in bankruptcy *commenced before its passage*, or any pains, penalties or forfeitures incurred under said act; but that "every such proceeding might be continued to its final consummation," in like manner as if that act had not passed. A petition in bankruptcy was filed by Richardson on the 3d of March 1843, and the question arose whether it was cut off by the repealing act approved on the same day. It appeared that the petition was filed about noon, while the repealing act was not, in fact, approved by the president until late in the same day, several hours after the filing of the petition. It was ruled, upon the case presented, that the Act of Congress should be held to have taken effect only from the act of approval by the president, and not by relation from the commencement of the day on which such approval was given. The court said: "So that we see that there is no ground of authority, and certainly,

there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purpose of substantial justice:" *In Matter of Richardson*, 2 Story 571.

In *People* v. *Clark*, 1 Cal. 406, Clark was elected county judge at an election regularly appointed and held. On that day the legislature passed an act repealing the one by virtue of which the election was held, and conferring upon the governor the power of appointment. The repealing act was approved the same day, but at what hour of the day it did not appear. Several days thereafter the relator was appointed by the governor county judge. The court upheld the validity of the election, saying that "the time of the approval of the executive is a fact which can be ascertained and proven, and in all cases, where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when the event—the passage of the act—occurred should be had:" *People* v. *Clark*, 1 Cal. 406; *Craig* v. *Godfroy*, Id. 415.

The case just cited was relied upon as an authority to the proposition that parol evidence was admissible to prove that a bill had been approved by the governor at a time when he was not authorized to approve it: *Fowler* v. *Winslow*, 2 Cal. 165; overruled in *Sherman* v. *Story*, 30 Cal. 253, because the approved bill imports absolute verity.

The case of *Louisville* v. *Savings Bank*, 104 U. S. 469, presents a question somewhat analogous to *People* v. *Clark*, *supra*. The people of the state of Illinois adopted, July 2d 1870, an amendment to the state constitution prohibiting subscriptions by towns, cities, &c., to aid in the building of railroads. On the same day the township voted to issue aid-bonds, by a vote of only fifty-two votes for and two against the proposition. Upon these facts the Supreme Court of the United States held the bonds valid; holding that the polls opened for the adoption of the constitutional amendment having closed at six o'clock in the evening of that day, the amendment was not adopted until that hour, and the court would presume that all of the fifty-two votes for issuing the bonds had been cast and counted before that hour. The case is a very instructive one.

In *National Bank* v. *Burkhardt*, 100 U. S. 686, it was said: "For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending upon the order of events occurring on the same day is involved, this rule is necessarily departed from." See *Westbrook Manuf. Co.* v. *Grant*, 60 Me. 88.

There are numerous exceptions to the general rule—that a day is indivisible—"and whenever it becomes necessary to determine who of several persons have priority of right, time may be distinguished with accuracy:" *Tufts* v. *Carradine*, 3 La. Ann. 430. Thus where one writ of attachment was lodged in the sheriff's office one minute before another writ, the former was held to have precedence. "Time is in its nature divisible from years down to days, hours and minutes; a minute, therefore, will give a priority as essentially in point of time as a year or a day:" *Callahan* v. *Hallowell*, 2 Bay (S. C.) 8; *Brainard* v. *Bushnell*, 11 Conn. 16. Where it is necessary to show which of two events took place first, the court may enter into the question of the fractions of a day, and it will regard the particular hour of the day at which the defendant dies, so as to see whether execution issued previously to his demise: *Clinch* v. *Smith*, 8 D. P. C. 337. This brings up to mind the case cited

by Blackstone, where father and son were hung at the same time. There evidence was introduced to show that the son struggled last, thus showing that he outlived his father and inherited the property, so that the daughters of the son could exclude the second son of the father (their uncle) in the inheritance of their grandfather's estate.

In *Roe d. Wrangham* v. *Hersey*, 3 Wils. 274, the court characterized, as a mere fiction of law, the general proposition that there were no fractions of a day; that "by fiction of law, the whole time of the assizes and the whole session of parliament may be, and sometimes are, considered as one day; yet the matter of fact shall overturn the fiction in order to do justice between the parties."

In *Combe* v. *Pitt*, 3 Burr. 1423, 1434, Lord MANSFIELD said: "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so too, when it is necessary and can be done; for it is not like a mathematical point which cannot be divided."

In *Pugh* v. *Robinson*, 1 T. R. 116, BULLER, J., said, there being no fraction of a day in judicial proceedings where there are two judgments, both referring to the same day, the priority of one cannot be averred: *Rockhill* v. *Hanner*, 4 McL. 554; s. c. 15 How. 189; *Burney* v. *Boyett*, 1 How. Pr. 39; *Mechanics' Bank* v. *Gorman*, 8 W. & S. 304; *Adams* v. *Dyer*, 8 Johns. 347; *Metzler* v. *Kilgore*, 23 Am. Dec. 76 (Mortgage and Judgment); *Hendrickson's Appeal*, 24 Penn. St. 363; *Claason's Appeal*, 22 Id. 359.

And where two judgments of different date were rendered against a defendant, and he afterwards acquired real estate upon which these judgments became a lien at one and the same time, neither had priority over the other: *Michaels* v. *Boyd*, 1 Ind. 259.

In some cases a judgment has been deemed to have taken effect from the earliest moment of the day: *Edwards* v. *Reginam*, 9 Exch. 628; *Wright* v. *Mills*, 4 H. & N. 488; *Green* v. *Laurie*, 1 Exch. 335.

A different rule is declared in *Biggam* v. *Merritt*, Walker (Miss.) 430; s. c. 12 Am. Dec. 576, where it is said the court will ascertain which was entered first and award its preference: *Johnson* v. *Smith*, 2 Burr. 950; *Lemon* v. *Staats*, 1 Cow. 592; *Small* v. *McChesney*, 3 Id. 19; *Rogers* v. *Beach*, 18 Wend. 533; *Bates* v. *Hinsdale*, 65 N. C. 423; *Small's Appeal*, 24 Penn. St. 398 (Mortgage and Judgment); *Murfree* v. *Carmack*, 4 Yerg. 270; *Berry* v. *Clements*, 9 Humph. 312.

So where there is a conflict between bankruptcy and attachment proceedings, the very hours may be shown: *Thomas* v. *Desanges*, 2 B. & A. 586; *Saddler* v. *Leigh*, 4 Camp. 197; *Stead* v. *Gascoigne*, 8 Taunt. 527; *Westbrook Manuf. Co.* v. *Grant*, 60 Me. 88; *Godson* v. *Sanctuary*, 4 B. & A. 255; *In re Welman*, 7 Law Reporter 25; *Ladley* v. *Creighton*, 70 Penn. St. 490.

So the same rule is held with respect to creditor's bills: *Safford* v. *Douglas*, 4 Edw. Ch. 537; *Fitch* v. *Smith*, 10 Paige 1.

Or where two courts each appoint a receiver: *People* v. *Central City Bank*, 53 Barb. 412.

But, as a general rule, courts will not inquire into fractions of a day except to prevent injustice: *Clute* v. *Clute*, 3 Denio 263; s. c. 4 Id. 241; *Blydenburgh* v. *Cotheal*, 4 Comst. 418; s. c. 5 How. Pr. 200; *Jones* v. *Porter*, 6 Id. 286; *Rogers* v. *Beach*, 18 Wend. 533; *Havens* v. *Dibble*, Id. 655; *Brainard* v. *Hanford*, 6 Hill 368; *Lester* v. *Garland*, 15 Ves. 246; *Bigelow* v. *Willson*, 1 Pick. 485; *Portland Bank* v. *Maine*

Bank, 11 Mass. 204; *Johnson* v. *Pennington*, 3 Green (N. J.) 188; 3 Opinions Attorney-General 82; *Kimm* v. *Osgood*, 19 Mo. 60.

A pauper entered upon the occupation of premises at twelve o'clock on September 30th 1850, and on the same evening signed a memorandum which stated that the tenancy was for one year, commencing on the 30th instant. He continued in possession until September 29th 1851, about four o'clock in the afternoon of which day he gave up possession to an incoming tenant: *Held*, that the fractions of the day on which the pauper entered were not to be regarded, and therefore he had occupied the premises for "one whole year at the least:" *Reg.* v. *St. Mary, Warwick*, 1 El. & Bl. 816; s. c. 17 Jur. 551; 22 L. J., M. C. 109. Where the right of the crown and a creditor comes into conflict, fractions of a day cannot be taken into account, but the former must prevail: *Edwards* v. *Reg.*, 9 Exch. 628; 18 Jur. 384.

We are not unmindful that there are cases which hold that there are no fractions of a day. Thus, *In Matter of Howes*, it appeared that the bankrupt act was repealed March 3d 1843. Hower presented his petition on that day, and it was held that he was too late: that on questions of that nature there can be no division of a day: 21 Vt. 619; s. c. 6 Law Reporter 297. And a like decision had been previously made: *Matter of Welman*, 20 Vt. 657; s. c. 7 Law Reporter 25.

For a case deciding which of two inconsistent statutes passed on the same day should prevail, see *Metropolitan Board of Health* v. *Schmades*, 10 Abb. Pr. (N. S.) 205.

For an instance where a day was divided by contract in computing time, see *Grosvenor* v. *Magill*, 37 Ill. 239.

CONSTITUTIONAL AMENDMENTS. — In the case of *Louisville* v. *Savings Bank*, *supra*, the question was decided as to the time an amendment to the constitution takes effect. It is there decided that the amendment voted for July 2d 1870, to the Constitution of Illinois, took effect when the polls closed on that day at six o'clock in the evening.

In this the Supreme Court followed the Illinois case of *Schall* v. *Bowman*, 62 Ill. 321, and subsequent cases: *Richards* v. *Donagho*, 66 Ill. 73; *Wright* v. *Bishop*, 88 Id. 302. See other cases in the Supreme Court of the United States: *Wade* v. *Walnut*, 105 U. S. 1; where it was assumed that the amendment to the Constitution, voted for July 2d 1870, took effect on that day: *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625; *County of Moultrie* v. *Rockingham Ten Cent Savings Bank*, Id. 631; *County of Randolph* v. *Post*, 93 Id. 502; *Fairfield* v. *County of Gallatin*, 100 Id. 47; *Walnut* v. *Wade*, 103 Id. 683.

Congress, under the Reconstruction Act, approved the Constitution of Virginia on April 10th 1869, and ordered it to be submitted to the people. On July 6th 1869, it was submitted and adopted by a large majority of the people, who, on the same day, elected a governor, legislature and other state officers. The governor was inaugurated in September 1869, and the legislature met in October 1869, and passed acts ratifying the 14th and 15th Amendments to the Constitution of the United States — all of these preliminaries being required by the Reconstruction Acts before the admission of the state to representation in Congress. Congress, on January 26th 1870, passed an act admitting the state to such representation. The Constitution contained a provision for homestead and exemption, but this was not applicable to debts incurred prior to the time the Constitution went into effect: *Held*, that as to the clause relating to exemption, the Constitution went into

effect on the day of its ratification by the people, July 6th 1869. Opinion by WAITE, C. J.: *In re Deckert*, 13 Am. L. Reg. 624.

Where the governor, speaker of the senate and president of the convention, or any two of them, were to compare the votes, and if it appeared that a majority of the votes cast were for the new constitution, then any two of them should append a certificate of the result of the votes, from which time the constitution was established, and the governor made proclamation of the result, it was said the proclamation of the governor merely *attested the date* at which such constitution went into effect: *Bilbrey* v. *Poston*, 4 Bax. (Tenn.) 232.

In 1869 the people of Texas adopted a new constitution in pursuance of the Reconstruction Act of Congress of March 2d 1867, and acts supplemental thereto, and at the same time voted for members of the legislature, governor and other state officers. Before the state could be represented in Congress it was necessary that that body should approve of such constitution, which it did in 1870. It was said that "this condition of the reconstruction laws did not prevent the constitution from becoming the organic law of the state, *on its ratification by the people*, for all the purposes of state government:" *Campbell* v. *Fields*, 35 Tex. 752.

In *Real* v. *People*, 42 N. Y. 276, it is said: "The result of the election showing the adoption of this article by a majority of the votes cast, must, within the meaning of the rule [that every law takes effect upon its passage], be deemed its passage. The canvass of the votes cast, by the various boards of canvassers as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the state board of canvassers as required by law. When the result was declared by the state board of canvassers, the article was adopted, and, under the rule, became operative at once, unless, from the nature of the provisions themselves, or those of some other law, it appears that it was to take effect at some future period, or unless it clearly appear that the intention of the framers of the article, and of those by whom it was adopted, was, that it should not take effect until some definite future time."

This was upon the adoption of a new constitution, which declared: "Sect. 5. This constitution shall be in force from and including the first day of January next after its adoption by the people." The election was held in November, and the result canvassed and declared in December. This case has been cited with approval in *People* v. *Gardner*, 59 Barb. 198; s. c. 45 N. Y. 812.

Many of the state constitutions have express provision what shall be done before an amendment to it shall take effect; while other constitutions give the legislature power to provide rules and regulations, even to declaring what acts shall be done previous to the time the amendment goes into force. Some (possibly the greater number) state constitutions contain a clause similar to the constitution of Indiana, viz.: "If a majority of said electors shall ratify the same, such amendment or amendments shall become a part of their constitution:" Art. xvi. sect. 1. It is clear that a constitution cannot be amended in any other way than that which has been provided by it If no provision for its amendment has been made, then the legislature has the power to prescribe the manner in which it may be done, when the amendments shall take effect, and submit them to the people. If the people ratify them according to the provisions of the legislative act, then they become part of the organic law in the manner and at the time provided in such act. But if the constitution has provided the way for amendment, that way

and no other must be followed. The legislature can attach no condition to the submission: *State* v. *Swift*, 69 Ind. 518; *Collier* v. *Frierson*, 24 Ala. 100.

Neither can it say when the amendment shall go into effect, for the voice of the people expressed in a legitimate way overrides the provisions of the act of the legislature.

The Constitution of the United States, upon the subject of amendments, is not unlike that of Indiana; yet the 13th, 14th and 15th Amendments to that instrument are generally supposed and spoken of as having taken effect on the day they were declared by the secretary of state to have been ratified by the requisite number of states, although the last state ratifying them had performed that act some time before. *Slaughter House Cases*, 16 Wall. 91, dissenting opinion of Mr. Justice FIELD: "On the 18th of December 1865, this amendment was ratified, that is, the official proclamation of its ratification was then made." Dissenting opinion of Mr. Justice FIELD in *Ex parte Virginia*, 100 U. S. 363.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of New Hampshire.

HALL *v.* BUTTERFIELD.

An infant who purchases goods on credit, and does not return them, is liable for so much of the price as is equal to the benefit derived by him from the purchase.

The question of the amount of benefit received by the infant is one of mixed law and fact, to be found by the tribunal trying the facts.

ASSUMPSIT to recover for goods sold and delivered. The defendant pleaded infancy, and the question was reserved whether that was a bar to the plaintiffs' recovery. The defendant was engaged in trade, and the goods were purchased by him for the purposes of trade, and were not necessaries within the ordinary meaning of that term.

Albin & Streeter and *Rand*, for the plaintiffs.

Mugridge, for the defendant, contended that the contract was voidable at the election of the defendant, and that nothing was necessary to be done by him as a prerequisite to avoidance, citing and commenting on *Heath* v. *West*, 28 N. H. 101; *Fitts* v. *Hall*, 9 Id. 446; *Badger* v. *Phinney*, 15 Mass. 362; *Carr* v. *Clough*, 26 N. H. 294.